(3)

06- 540

No. _____

FILED
SEP 17 2006

In The

Supreme Court of the United States

WACLAW M. TROJANEK,

Petitioner,

vs.

SAFEWAY INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals, State Of Arizona, Division One

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

WACLAW M. TROJANEK
4428 W. Cholla
Glendale, Arizona 85304
602-938-8522

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WACLAW M. TROJANEK, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, SAFEWAY, INC., Respondent Employer, SAFEWAY STORES INC., Respondent Carrier.	) 1 CA-IC 05-0030) DEPARTMENT D) **MEMORANDUM DECISION**) (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)) (Filed Oct. 25, 2005)

Special Action – Industrial Commission

ICA CLAIM NO. 20023-090078

CARRIER NO. 17106299

Administrative Law Judge Stephen W. Pogson

AWARD AFFIRMED

Waclaw M. Trojanek — Glendale
Petitioner *In propria persona*

Laura L. McGrory, Chief Counsel — Phoenix
The Industrial Commission of Arizona
Attorney for Respondent

Jones, Skelton & Hochuli — Phoenix
By Charles G. Rehling
Attorneys for Respondents Employer and Carrier

HALL, Judge,

¶1 The claimant, Waclaw Trojanek, seeks special action review of the denial of his petition to reopen. First, the claimant argues that in deciding to deny the petition to reopen, the administrative law judge (ALJ) erroneously relied on the unfairly biased independent medical examination (IME) report of Zoran Maric, M.D. Second, the claimant contends that the employer and carrier, Safeway Stores, wrongfully terminated him. Finally, the claimant argues that his industrial injury continues to "assist" in the deterioration of his well-being and health, status. We determine that the ALJ did not abuse his discretion by finding that he lacked jurisdiction to consider the petition, and we affirm the award and decision upon review.

I.

¶2 The undisputed facts are as follows. On October 11, 2002, the claimant sustained a work-related injury to his back. Although the carrier initially accepted the claim and the claimant received workers' compensation benefits for a period of time, the carrier closed the claim without permanent impairment following Dr. Maric's IME.

¶3 The claimant protested the closure, and the matter proceeded to hearing in July and October of 2003. The ALJ, Honorable Marigene Dessaint, issued a decision upon hearing and findings and award on October 29, 2003, in which she found the claimant's condition stationary without, permanent impairment effective June 2003. The claimant requested review, and Judge Dessaint issued a decision upon review affirming and modifying her prior decision.

¶4 Judge Dessaint's award became final and unappealable when the claimant did not timely file a petition for special action review with the Arizona Court of Appeals. *See* Ariz. Rev. Stat. (A.R.S.) § 23-943(H) (1995) ("The decision upon review shall be final unless within thirty days after the date of mailing of copies of such decision to the parties, one of the parties applies to the court of appeals for a writ of certiorari pursuant to § 23-951.").

¶5 Instead, on the thirtieth day following the mailing of the decision upon review, the claimant filed a complaint for "administrative review" on his own behalf in Maricopa County Superior Court. The superior court, Honorable Michael D. Jones, dismissed the case for a lack of subject matter jurisdiction. *See* § 23-943(H).

¶6 The claimant filed a second complaint on his own behalf in Maricopa County Superior Court. The superior court, Honorable Rebecca Albrecht, dismissed the second complaint because when the claimant had accepted workers' compensation benefits, he also had elected to forgo "the right to sue his employer." *See* A.R.S. § 23-1024(A) (1995) ("An employee . . . who accepts compensation waives the right to exercise any option to institute proceedings in court against his employer. . . .").

¶7 On November 30, 2004, citing a "previously undiscovered surveillance tape," stress to his heart, and a decline in his "sense of well being," the claimant filed a petition to reopen. The claimant's supplemental letter also included reference to Dr. Maric's "misinterpretation" of the surveillance tape. The claimant attached a medical report that had been issued two months earlier by James Grepling, a physician's assistant. Mr. Grepling's report stated,

however, that there had been "no apparent change" in the claimant's medical condition.

¶8 On December 7, 2004, the carrier denied the petition to reopen. Although the claimant subsequently requested a hearing on December 20, 2004, his request for hearing form specified that this particular request concerned Judge Dessaint's prior award of October 29, 2003, rather than the carrier's more recent December 7, 2004 denial of the petition to reopen.

¶9 The ALJ, Honorable Stephen Pogson, issued a notice of hearing. In a letter dated January 24, 2005, counsel for the employer and carrier objected to hearing as follows: "With all due respect to the [claimant], the Commission is without jurisdiction to further process this most recent request for hearing. . . . The [claimant's] current Request for Hearing challenging the now final October 23 [sic], 2003 Award issued by [J]udge Dessaint should be dismissed forthwith."

¶10 The claimant responded by asking Judge Pogson not to cancel the hearing for reasons that were nearly identical to those he previously had provided in his November 30, 2004 petition to reopen. The justifications included the claimant's discovery of the surveillance tape, his continued physical deterioration, his heart condition, and Dr. Maric's misinterpretation of the surveillance tape.

¶11 Judge Pogson issued a decision upon hearing and findings and award on January 31, 2005, in which he determined that he lacked jurisdiction to consider the claimant's petition because it constituted an impermissible challenge to Judge Dessaint's final award of October 29, 2003. Judge Pogson also indicated that even if the claimant had

intended his request to be a petition to reopen, it was not supported by the evidence.

¶12 On February 10, 2005, the claimant requested review of Judge Pogson's award. On the same date, the claimant filed a request for hearing regarding the carrier's December 7, 2004 denial of his petition to reopen. In this new request for hearing, the claimant asserted that reopening was appropriate because of a "[p]reviously undiscovered surveillance tape" and the "false reports" of Safeway and Dr. Maric. The claimant attached the same medical report by Mr. Grepling that had been attached to the November 30, 2004 petition to reopen.

¶13 On March 1, 2005, Judge Pogson summarily affirmed his January 31, 2005 award. The claimant filed a timely petition seeking special action review from this court. It appears that the claimant's February 10, 2005 request for hearing regarding the carrier's December 7, 2004 denial of his November 30, 2004 petition to reopen remained unresolved when the ICA transferred the claimant's file to the court of appeals.

II.

¶14 We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2) (2003) and 23-951(A) (1995), and Arizona Rule of Procedure for Special Actions 10. Although we defer to Judge Pogson's factual findings, we independently review his legal conclusions. *See PFS v. Indus. Comm'n,* 191 Ariz. 274, 277, 955 P.2d 30, 33 (App. 1997).

III.

¶15 The claimant presents three questions for review: (1) Did Judge Pogson err when he denied the claimant's request for hearing based on the biased medical report of Dr. Maric? (2) Did Safeway wrongfully terminate the claimant? (3) Does the claimant's industrial injury continue to assist in the deterioration of his well-being and health status? We address each question below.

IV.

¶16 The claimant's first argument concerns the introduction and consideration of Dr. Maric's IME report. In his IME report issued January 29, 2003, Dr. Maric concluded that the claimant was stationary without impairment, and he questioned the claimant's eagerness to return to work. Additionally, Dr. Maric referred to a surveillance video in which the claimant purportedly loaded groceries, bent and twisted easily, and lifted a suitcase without apparent difficulty.

¶17 Although Judge Dessaint may have considered Dr. Maric's IME report prior to issuing her decision, this court can no longer consider the appropriateness of Judge Dessaint's award; that award became final and unappealable when the claimant failed to timely protest Judge Dessaint's decision upon review.

¶18 Here, we consider only Judge Pogson's award and decision upon review, which were not based on Dr. Maric's report or any other medical information that Judge Dessaint may have considered. Rather, Judge Pogson's award states, in relevant part, as follows:

> 1. This matter has already been litigated. The last proceeding ended December 2003. The applicant did not seek review by the Court of Appeals but instead filed a proceeding with the Maricopa County Superior Court. Although applicant styles his most recent request as a "Reopening", there was no Petition to Reopen filed and there is nothing in his documents which, even if taken to be true, would support the processing of a reopening petition by the Claims Division of the Industrial Commission.
>
> 2. I find that the Commission is without jurisdiction to consider applicant's Request for Hearing dated December 20, 2004 for the reasons set forth in Safeway's counsel's letter of January 4 [sic], 2005.

¶19 Judge Pogson's decision was appropriate. An Industrial Commission of Arizona (ICA) award becomes final and unappealable after thirty days have passed from the date of mailing of a decision upon review. § 23-943(H). Here, despite the obvious notice in the decision upon review that directed the claimant to "apply to the Arizona Court of Appeals" if he was dissatisfied,[1] the claimant failed to timely seek special action relief from this court.

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[1] Pursuant to A.R.S. § 23-943(H), each decision upon review issued must notify the parties that they can seek review from the court of appeals if they are dissatisfied. Accordingly, every ICA decision upon review includes the following language:

> **NOTICE:** Any party dissatisfied with the Decision Upon Review may apply to the Arizona Court of Appeals, Division One, 1501 W. Washington, Phoenix, Arizona 85007, for a review of the lawfulness of the decision pursuant to the provisions of Arizona Revised Statutes, section 12-120.21B. and section 23-951A. See also, Arizona Revised Statutes,

(Continued on following page)

¶20 Even if this court considered the claimant's complaint or "administrative review" before Judge Jones to be a timely but misfiled petition for special action review, the claimant abandoned any possibility of salvaging a timely petition for review when Judge Jones dismissed the complaint and the claimant no longer pursued the matter.

V.

¶21 We next address the claimant's wrongful termination argument. Although a workers' compensation recipient may file suit for retaliatory wrongful discharge against a former employer in superior court, *see* A.R.S. § 23-1501(3)(c)(iii) (Supp. 2005), a claim for wrongful discharge cannot be filed with the ICA. As the court explained in *Kaibab Industries v. Industrial Commission,* 196 Ariz. 601, 607, ¶ 17, 2 P.3d 691, 697 (App. 2000), "[u]nlike a court of general jurisdiction, the Commission['s] . . . jurisdiction is limited to questions pertaining to the worker's compensation law. . . ." *See also Rios v. Indus. Comm'n,* 120 Ariz. 374, 376, 586 P.2d 219, 221 (App. 1978). Accordingly, we cannot address the claimant's wrongful termination argument in this decision on review.

VI.

¶22 Finally, we consider the claimant's argument that reopening is justified because his October 11, 2002 industrial

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Vol. 17B, Rule 10, Rules of Procedure for Special Actions. This Decision Upon Review shall be final unless an application is made within thirty (30) days of the mailing of this Decision to the parties. Arizona Revised Statutes section 23-943H.

injury continues to assist in the deterioration of his well-being and health status. This argument necessitates our consideration of the requirements for reopening a closed claim.

¶23 We reiterate that we are reviewing only Judge Pogson's dismissal of the claimant's request for hearing, which arose out of Judge Dessaint's October 29, 2003 award. We are not reviewing the claimant's February 10, 2005 request for hearing, which does not appear to have been resolved before the ICA. It appears, however, that the claimant believes that he has demonstrated justification for the reopening of his claim.[2] Accordingly, for the sake of substantial justice, we address the claimant's reopening argument below.

¶24 A claimant cannot reopen a claim by attacking the validity of a prior, final award. *See Phoenix Cotton Pickery v. Indus. Comm'n,* 120 Ariz. 137, 139, 584 P.2d 601, 603 (App. 1978). A claimant can only reopen a closed claim by showing a new, additional, or previously undiscovered temporary or permanent condition that is causally related to the industrial injury. *Stainless Specialty Mfg. Co. v. Indus. Comm'n,* 144 Ariz. 12, 16-19, 695 P.2d 261, 265-68 (1985); *see* A.R.S. § 23-1061(H) (Supp. 2005).

¶25 Moreover, a petition to reopen must include a physician's Statement demonstrating some new, additional, or previously undiscovered condition. § 23-1061(H);

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[2] The claimant's letter dated January 27, 2005, which responded to counsel's January 24, 2005 letter objecting to hearing, suggested that reopening was appropriate because of the allegedly newly discovered surveillance video, the claimant's continued physical deterioration, his heart problem, and Dr. Maric's interpretation of the surveillance video.

see Ariz. Admin. Code R20-5-133.B ("A claimant shall provide to the Commission a copy of a medical report supporting the disability or condition justifying the re-opening of the claim."); *see also Blickenstaff v. Indus. Comm'n,* 116 Ariz. 335, 339, 569 P.2d 277, 281 (App. 1977) ("[I]n order for a physician's report to be sufficient under [the previous version of § 23-1061(H)], it must contain sufficient medical facts which, if true, would constitute a prima facie showing of entitlement to relief.").

¶26 Both the claimant's November 30, 2004 petition to reopen and his December 20, 2004 request for hearing fail to show *prima facie* evidence of entitlement to reopening. The surveillance video, Dr. Maric's interpretation of that video, the claimant's purportedly worsening heart condition, and the continual decline of the claimant's sense of well-being do not create a new, additional, or previously undiscovered condition that is causally related to the October 11, 2002 industrial injury.

¶27 Likewise, the medical expert's statement that the claimant attached to his November 30, 2004 petition is the statement by Mr. Grepling that the claimant's condition has not changed. This statement was obviously insufficient to meet the requirement that a claimant include a physician's statement demonstrating some new, additional, or previously undiscovered condition. *See generally Arizona Workers' Compensation Handbook* § 11.2.6.1, at 11-11 (Ray J. Davis et al. eds., 1992).

VII.

¶28 For the foregoing reasons, we affirm the award and decision upon review.

/s/ Philip Hall
PHILIP HALL, Presiding Judge

CONCURRING:

/s/ Lawrence F. Winthrop
LAWRENCE F. WINTHROP, Judge

/s/ Patricia K. Norris
PATRICIA K. NORRIS, Judge